No. 12194.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLANT'S OPENING BRIEF.

GEORGE W. MANIERRE,
PAUL G. BRECKENRIDGE,
307 West Eighth Street, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLANT'S OPENING BRIEF.

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant Mabel E. West respectfully submits to the Court this her opening brief on appeal.

Jurisdiction.

This action is one instituted May 13, 1948, by appellant, Mabel E. West, the plaintiff below (hereinafter sometimes referred to as Mrs. West) against appellee W. E. Conrad, one of the defendants below (hereinafter sometimes referred to as Mr. Conrad), to recover damages in the sum of $9,900.00, being three times the amount by which the payments made by plaintiff to said defendant within one year prior to the commencement of the action exceeded the maximum rent which said defendant could lawfully demand, accept or receive, as prescribed under the author-

ity of the Emergency Price Control Act of 1942 and of said act as amended, and as prescribed under the authority of the Housing and Rent Act of 1947, together with her reasonable attorney's fees and costs. The date of the filing of the original complaint will appear from the transcript.

The other appellee and defendant below, Howard F. Conrad, was brought in by amended complaint as a matter of course, filed May 26, 1948 [R. 9] in which amended complaint the same relief was sought. [R. 5, 6.]

It was alleged in the amended complaint (hereinafter sometimes referred to as the complaint) that the action was brought in pursuance of the provisions of Section 205 of the Housing and Rent Act of 1947, which specifically confers jurisdiction upon the District Court. [R. 2.] It is also true that jurisdiction was conferred upon the District Court under Section 205(c) of the Emergency Price Control Act of 1942 and in the amendment of 1944 (the Stabilization Extension Act of 1944). The only difference in the three acts in reference to conferring jurisdiction is in a choice of language and of the location in which it appears. The defendants made a denial of the allegation of jurisdiction [R. 10], but in the Findings of Fact proposed by counsel for defendants and adopted by the District Court, the Court found it had jurisdiction as alleged in the Complaint. [Finding I. R. 41.] Judgment on the merits was rendered in favor of the defendants. [R. 46.] This judgment was a final decision of the District Court and this Court is given jurisdiction of an appeal from it under Section 1291, Title 28, of the United States Code.

Statement of the Case.

Defendant W. E. Conrad is, and for a number of years last past has been, the legal and equitable owner of a certain double (side by side) dwelling house [R. 53] located at and known as 7462 Hollywood Boulevard (the street number of that half of said dwelling house involved in this action), in the County of Los Angeles, in a residential neighborhood quite free and quite removed from business or commercial establishments. [R. 53.] Since March, 1942, and up to February 1, 1947 [R. 91, 94], said defendant had rented the half of said double dwelling house above noted, hereinafter sometimes referred to as said premises, under a rental "ceiling" of $75.00 per month. [R. 19-22, incl., Plaintiff's Exhibit No. 2.] The tenant immediately preceding plaintiff in possession of said premises held under a month to month tenancy of $75.00 [R. 92], and although defendant during that time occupied the other half of said double house [R. 93] he claimed he did not know whether or not this previous tenant kept roomers. Said defendant testified "there was an OPA ceiling. Mrs. Le Grange had paid $75.00 a month, which was frozen, and barely paid the taxes." [R. 91.] Defendant did not make any re-registration of said premises with the Office of Price Control or any rent control authorities. [R. 94.] Said defendant, apparently being dissatisfied with said "ceiling," gave the tenant preceding plaintiff in possession of said premises notice terminating her tenancy on the ground that he was "going to change the classification and lease the property as business property" and "would like to have the house as early as possible." [R. 92.] Said defendant made no changes or alterations in said premises except some minor redecorating and repairs to plaster for the purpose of

"cleaning up and for the purpose of renting." [R. 92, 93.] He thereupon, on or about the 4th day of March, 1947, leased said premises to plaintiff, for a term of two years at a monthly rental of $350.00 per month; said lease was in writing and in words and figures as set forth in Plaintiff's Exhibit 1 [R. 16 to 18, incl.], and was prepared by defendant W. E. Conrad. [R. 89; Request for Admissions (9), R. 24, and Admission (9), R. 30, and R. 97, last 2 lines.

Plaintiff paid defendant $700.00 on the execution of said written lease and the further sum of $4,550.00 at the rate of $350.00 per month from April 15, 1947, to and including the 15th day of April, 1948. [Request for Admission (17) R. 26, and Admission (17) R. 31.]

Plaintiff instituted this action to recover rental paid by her to and demanded and accepted by defendants in excess of the OPA "ceiling" of $75.00 per month within one year preceding the filing of her complaint, amounting to $3,300.00, and to have said amount trebled and for attorneys' fees and costs [Plaintiff's First Amended Complaint, R. 2 to 9, incl.]; to which defendants filed their answer [R. 10 to 15, incl.]. Plaintiff served on defendants and filed a Request for Admissions [R. 23 to 27, incl.] and defendants filed a Reply to Request for Admissions [R. 28 to 32]. The matter came on for trial before the Honorable Leon R. Yankwich on October 12-13, 1948. Thereafter said Judge signed and filed Findings of Fact and Conclusions [R. 41 to 45, incl.] and signed and filed the Judgment in said action in favor of defendants [R. 45, 46]. From that judgment the plaintiff appeals. [R. 47.]

The Questions Involved and the Manner in Which They Are Raised Are as Follows:

(1) May the spirit and/or intent and express provisions of the Rental Control Acts and of the regulations issued in pursuance thereof, be abrogated and disregarded by the landlord of premises duly registered thereunder by means of a simple change in nomenclature? (Raised by the pleadings, evidence and admissions.)

(2) Where a typical single family dwelling house (one-half of double dwelling house) registered under a "ceiling" as "housing accommodations" and continuously used as such, are re-rented under a written lease expressly permitting the use thereof for any "lawful use" does the fact that the parties to said written lease intended or expected that the new tenant would rent out an unidentified number of rooms therein (admitted for purpose of argument only) in addition to residing in said premises herself, of itself "decontrol" said premises and release it and the landlord from the burdens and obligations imposed by the Rent Control Acts and the registration thereunder? (Raised by pleadings, admissions and evidence.)

(3) If in addition to the *premises and assumptions* contained in the preceding question, the assumption that the parties intended that the persons to whom the rooms might be rented were elderly people, all ambulatory, would those premises and assumptions "decontrol" said property and release it and the landlord from the burdens and obligations of the Rental Control Acts and the "registration" thereunder? (Raised by evidence appellant believes incompetent.)

(4) In what manner and to what extent can the alleged unwritten intent of the parties to the written lease be material or competent to contradict the expressed plain

unambiguous provisions of the lease, particularly when urged by the draftsman thereof? The lease prepared by defendant (a licensed real estate broker for a number of years [R. 91]) provides that the premises *may* be used, in addition to the use stated, for any "lawful purpose." He now attempts to vary and contradict this plain, unambiguous provision by having the Court find that the parties did not intend this but intended to use it for business purposes only. (See paragraphs III and IV of defendant's answer [R. 11-12], paragraph II of defendant's first affirmative defense [R. 14], and paragraphs I and II of defendant's second affirmative defense [R. 14-15].) (Raised by pleadings, admissions, evidence, findings of fact and conclusions of law.)

(5) Where property is legally registered as "housing accommodations" under the existing rental control acts, may the "registration" and registered "ceiling" be disregarded and evaded merely by notice to tenants of an inchoate plan or scheme to henceforth designate said "housing accommodations" as business property? (Raised by pleadings, evidence, findings VI and VII, conclusions of law II, III and IV.)

(6) May a landlord of registered housing accommodations disregard and evade the "registration" and the registered "ceiling" by merely inserting in a lease the phrase "to be used as a guest house or any other lawful purpose"? (Raised by pleadings, evidence, findings VI and VII, conclusions of law II, III and IV.)

(7) May a landlord who has obtained possession of premises registered as "housing accommodations" under a rent control "ceiling," by serving notice on a tenant of the termination of the tenancy on the grounds of the landlord's desire or intent henceforth to rent the premises for

business purposes (not a permitted ground for eviction under the rental control acts) be freed *ipso facto* and *eo instanti* of the burdens of the "registration" and said property thereby become "decontrolled"? (Raised by pleadings, evidence, findings VI and VII, conclusions of law II, III and IV.)

(8) May the trial court disregard the Admissions of the Pleadings and the Admissions in the Reply to Request for Admissions and the terms of the written lease? (Raised by conflict between admissions and findings VI and VII.)

(9) Assuming, without admitting, that the intent of the parties was a material issue, and further assuming without admitting that the intent was to use the premises for "business purposes," if the business was that of furnishing "housing accommodations," would such an intent "decontrol" said premises or remove it from the scope and effect of the Housing and Rent Control Act of 1947, or said Act as amended? (Raised by findings VI and VII and conclusions of law II, III and IV.)

(10) Is there any conflict in the evidence as to said premises being used as and for "housing accommodations"? (Raised by admissions and evidence.)

(11) Does defendants' answer set up any legal defense to plaintiff's cause of action, the answer consisting largely of conclusions of law? (Raised by complaint and answer.)

(12) Is Finding No. VI supported by the evidence? (Raised by transcript of evidence.)

(13) Did defendant W. E. Conrad maintain the burden of proving his affirmative defense by competent evidence? (Raised by pleadings, admissions and evidence.)

(14) Is not that portion of Finding No. VI which finds that the purpose of plaintiff occupying said premises was not "within the scope of said term as used in the Housing and Rent Act of 1947, or said Act as amended" not a proper "finding of fact" but a "conclusion of law" and as such, is not said "conclusion of law" contrary to law? (Raised by finding VI.)

(15) Is not that portion of Finding No. VII reading as follows: "The Court finds that the defendant, W. E. Conrad, has not demanded or accepted nor received payment of rent in excess of the maximum prescribed under the authority of the Emergency Price Act of 1942 and of said Act as amended and as prescribed under the authority of "Housing and Rent Act of 1947" not only not supported by but against the evidence? (Raised by evidence, admissions and finding VII.)

(16) Is not the second paragraph of Finding No. VII not a proper "finding of fact" but a "conclusion of law," and, as such, not supported by the evidence and contrary to the law? (Raised by evidence and finding VII.)

(17) Is not the Court's Conclusion of Law No. 11 against the law, immaterial, ambiguous and insufficient to support the judgment herein? (Raised by admissions and conclusion II.)

(18) Is not conclusion of law III contrary to the law and the evidence? (Raised by conclusion III.)

(19) Is not conclusion of law IV contrary to the law and the evidence? (Raised by finding IV.)

Specification of Errors.

Appellant's appeal from the judgment of the trial court is grounded more on what appellant believes to be errors of the trial court (1) in interpreting and applying the law to the facts as admitted and proved and (2) in making and arriving at its Findings of Fact and Conclusions of Law, than on specific errors in the procedure and conduct of the trial.

I.

The Court erred in receiving and considering evidence of oral statements and conversations occurring prior and subsequent to the execution of the written lease for the purpose of contradicting or varying the plain and unambiguous provisions thereof. (This alleged error is based not on an alleged breach of the law of evidence, as the transcript shows few objections to the introduction of testimony, but rather on a rule of substantive law, as will be pointed out in our "Argument.")

II.

The Court erred in concluding that defendant W. E. Conrad and the dwelling house registered by him (as landlord) as "housing accommodations" under the Rental Control Acts, were released from the burdens and restrictions imposed by such "registration" and Rental Control Acts.

III.

The Court erred in concluding that because he found that the parties intended to use said premises for business

purposes (even though such alleged business purposes necessarily consisted primarily of using the premises for "housing accommodations") that the Rental Control Acts did not apply.

IV.

The Court erred in finding in substance that defendant W. E. Conrad, without any change or evidence of any requested change in "registration" or rental "ceiling," and without any change or alteration in the physical characteristics of the property, could, by the "legal legerdemain" of leasing the dwelling house as a "guest house" (which term itself necessarily involves "housing accommodations") or any other "lawful purpose," could change said property from "housing accommodations" registered under a ceiling of $75.00 per month to business property at $350.00 per month.

V.

The Court erred in not finding that the premises were used by plaintiff for "housing accommodations" as defined in the Rental Control Acts and Regulations.

VI.

The Court erred in finding that the purpose of plaintiff occupying said premises was "not for the purpose of plaintiff occupying said premises for housing or dwelling purposes within the scope of said term as used in the Housing and Rent Act of 1947 or said Act as amended." This is not a proper finding of fact but a conclusion of law, and as such it is contrary to the law. [Finding VI, R. 43.]

VII.

The Court erred in its Finding VII [R. 43] reading as follows:

> "The Court finds that the defendant W. E. Conrad has not demanded or accepted nor received payment of rent in excess of the maximum rent prescribed under the authority of the Emergency Price Control Act of 1942 and of said Act as amended, and as prescribed under the authority of the Housing and Rent Act of 1947."

This finding is not only not supported by but is against the evidence.

VIII.

The Court erred in the second paragraph of its Finding VII. [R. 43.] This is not a proper finding of fact, but a conclusion of law, and as such is not supported by the evidence and is contrary to the law.

IX.

The Court erred in its conclusion of law II. [R. 44.] This conclusion is against the law, immaterial, ambiguous, and insufficient to support the judgment herein.

X.

The Court erred in its conclusion of law III. [R. 44.] This conclusion is contrary to the law and the evidence.

XI.

The Court erred in its conclusion of law IV. [R. 44.] This conclusion is contrary to the law and the evidence.

Summary of the Argument.

The argument presented herein by appellant largely concerns itself with certain errors of law, particularly in the trial court's interpretation and application of the provisions of regulations issued under, and of the provisions of, the Rent Control Acts. However, there are several alleged specific errors noted, and appellant believes them to be substantial. One is to the effect that the very considerable body of parol evidence in the form of conversations, circumstances, and self-serving declarations introduced in an attempt to show the "purpose" or "use" intended or permitted by the written lease to be other than provided by its express terms, is not, by force of substantive law, and should not be considered as being, entitled to any probative value or as being any evidence of the matters attempted to be proved thereby. Argument as to this and other alleged specific errors, such as alleged in connection with the "findings" and "conclusions" is separately addressed to each such respective specification of error.

The main body of the argument attempts to follow the order and theory of the other specifications of alleged errors, particularly as to the effect and application to the facts herein of the Rent Control Acts, Regulations, rulings and Court decisions.

ARGUMENT.

As to Alleged Error I.

Much stress was put by the defendants upon the negotiations leading up to the making of the lease. Mr. Conrad testified that he had been in the real estate business since 1918 and had prepared the lease himself [R. 91, 89], particularly the clause descriptive of the purpose for which the dwelling house was to be used, viz., as a guest house or any other lawful purpose. [R. 97; and lease, Plaintiff's Exhibit 1, R. 16-18.]

There was in direct conflict with his sworn reply to plaintiff's request for admissions, in which he said that he "incorporated therein the demands of plaintiff that the subject premises be referred to and classified and designated as a 'guest home.'" [Admission (9), R. 30.] The lease having been executed, any testimony as to the prior negotiations was, of course, incompetent.

> "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."
>
> *Civil Code of California,* Sec. 1625.

Nevertheless, the Court permitted the testimony to go in, including evidence tending to show that Mrs. West intended to operate a sanitarium. "She owned the Holly View Sanitarium and was going to take the house for ambulatory patients." [R. 87.]

It would seem, in the light of the adjudicated cases, that appellees cannot be heard to complain of any lawful use to which the dwelling house was to be put, or, for that matter, that it was put to some lawful use other than that discussed in the negotiations.

Certainly the language "as a guest house or any other lawful purpose" is so plain that "he who runs may read." We are not driven to a consideration of the law governing the construction of a written document. As to the construction to be placed upon this language as between landlord and tenant the best expression which we have been able to find is that of Judge Shaw in *Davidson v. Goldstein,* 136 P. 2d 665 (Appellate Department, Superior Court of Los Angeles County, April 16, 1943), in which he said (p. 666):

> "The lease contains no limitation of the uses to which the lessee may put the leased property. In the absence of such limitation, the tenant may use the property for any lawful purpose not materially different from that in which they are usually employed, to which they are adapted or for which they were constructed. 36 Cor. Jur. 84, 87; Keating v. Preston, 1940, 42 Cal. App. 2d 110, 115, 108 P. 2d 479. The fact that before the written lease was entered into the parties discussed defendant's use of the building, and defendant said he wanted to lease it to engage in the tire business and would engage in that and the battery business, does not limit his use to those purposes. The conversation does not purport to have that effect, and even if it did, it could not be given such effect against the written lease containing no such limitation. Section 1625, Civil Code; section 1856, Code of Civil Procedure; Gibbs v. Seeger, 1933, 130 Cal. App. 123, 128, 19 P. 2d 514."

As to the parol evidence rule we invite the Court's attention to the language used by the Supreme Court of California in *In re Gaines' Estate,* 15 Cal. 2d 255, 100 P. 2d 1055 at 1060:

> "The parol evidence rule, as is now universally recognized, is not a rule of evidence but is one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said, the written memoral supersedes these prior or contemporaneous negotiations. See *Civ. Code,* sec. 1625; *Code Civ. Proc.,* sec. 1856; *Harding v. Robinson,* 175 Cal. 534, 166 P. 808; *Rottmann v. Hevener,* 54 Cal. App. 474, 202 P. 329; *Estes v. Delpech,* 73 Cal. App. 643, 238 P. 1085; *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.,* 23 Cal. App. 2d 642, 73 P. 2d 1241; 5 *Wigmore, Evidence,* sec. 2400, p. 236; 3 *Williston, Contracts,* sec. 631; *Restatement, Contracts,* secs. 237-244."

As to Alleged Error II.

Mrs. West testified that the house in question was an ordinary two-story 8-room house [R. 52; see also the Registration Statement, Plaintiff's Exhibit 2, R. 19] and that it could not have been used for a sanitarium "for several reasons, especially the den in the living room. There is a round platform to go down two steps into the living room which would be impossible for a patient or anybody else. Another thing, there are only two exits, the back door and front door" [R. 108]; that she never applied for a license to conduct any business there [R. 66]; that it was in a residence neighborhood and that there were no store buildings, commercial buildings, or office buildings on Hollywood Boulevard within a mile between La Brea and Rubio. [R. 53.]

This testimony was not denied.

It was obviously the opinion of the trial judge that renting a few rooms in an ordinary 8-room dwelling house was the operation of a commercial business as distinguished from providing housing accommodations. This is evidenced by the Findings VI and VII [R. 43] and the Conclusions II and III [R. 44], and this in the face of the law and regulations from the effect of which we are constrained to believe the defendants cannot escape.

Rent control had its inception in the Emergency Price Control Act of 1942. This was followed by the Amendment of 1944 (The Stabilization Extension Act of 1944, Public Law 383, 78th Congress, 1944, United States Congressional Service, p. 616) and the Price Control Extension Act of 1946 (Public Law 548, 79th Congress, 1946, United States Code, Congressional Service 632 at 644) and the Housing and Rent Act of 1947. These Acts supplement each other and the provisions thereof, includ-

ing the regulations issued under these Acts, each containing substantially the same terms. For convenience we have added to this brief an appendix A, being a résumé of pertinent Acts of Congress and rent control regulations and it is thought that we do not have to look far beyond these Acts and regulations for the law applicable to the instant case.

Under the Emergency Price Control Act of 1942, Section 2 (g), it was provided that "regulations, orders and requirements under this act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof"; and under Section 201 (a) that "the Administrator may from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act." This latter provision was carried into Section 201 (d) of the Amendment of 1944 and the authority of the Administrator and subsequently of the Housing Expediter, under the Housing and Rent Control Act of 1947, Section 204 (d), to issue regulations and to enforce compliance therewith has never been questioned.

Under Section 205 (e) of the Emergency Price Control Act a tenant was given the right to "bring an action either for $50.00 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs, as determined by the Court."

The language of Section 205 (e) was modified by the Amendment of 1944 which added the so-called "Chandler Defense" provisions to read as follows:

> "In such action the Seller" (in this case the lessor) "shall be liable for reasonable attorney's fees and

costs, as determined by the Court, plus whichever of the following sums is the greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based, as the Court in its discretion may determine, or (2) an amount not less than $25.00 or more than $50.00, as the Court in its discretion may determine; *provided, however, that such amount shall be the amount of the overcharge or overcharges, or $25.00, whichever is greater, if the defendant proves that the violation of the regulation, order or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*" (The so-called Chandler Defense is italicized.)

Under the Price Control Extension Act of 1946 the second sentence of Section 205 (e) of the Emergency Price Control Act of 1942 was amended to read:

"In any action under this subsection the Seller shall be liable for reasonable attorneys' fees and costs as determined by the Court, plus whichever of the following sums is greater (1): Such amount not more than three times the amount of the overcharge or the overcharges upon which the action is based, as the Court in its discretion may determine, or (2) an amount not less than $25.00 or more than $50.00, as the Court in its discretion may determine; *provided, however, that such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order or price schedule was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*" (The so-called "Chandler Defense," as modified, is italicized.)

Section 205 of the Housing and Rent Act of 1947 materially modified the provisions of the preceding Sections 205 so as to read as follows:

> "Any person who demands, accepts or receives any payment of rent in excess of the maximum rent prescribed under Section 204 shall be liable to the person from whom he demands, accepts or receives such payment, for reasonable attorney's fees and costs, as determined by the Court, plus liquidated damages in the amount of (1) $50.00 or (2) three times the amount by which the payment or payments demanded, accepted or received exceeded the maximum rent which could be lawfully demanded, accepted or received, whichever in either case may be the greater amount: *provided that the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*" (The further modified Chandler Defense is italicized.)

It will thus be seen that the policy of the Congress to protect the tenant was expanded in each of the amendments to the original Act, and while in the Act of 1947 the modified Chandler Defense was substantially retained, the Court was nevertheless divested of jurisdiction to exercise its discretion to award less than treble damages unless the "Chandler Defense" was proven.

In pursuance of the authority vested in him the Administrator in the first instance issued his Rent Regulation for Housing under which it was required that the landlord file a registration statement; that this statement was filed is not only proven but admitted. [Plaintiff's Exhibit 2, R. 19; Request for Admission (1), R. 23, and

Admission (1), R. 29.] This registration provided for a maximum monthly rental of the rental dwelling in question of $75.00 per month and it is admitted that no re-registration of the property was made. [Stipulation of Counsel, R. 94.] The regulation Section 1388.984 fixed the maximum rent of this rental dwelling as the rent on either May 1, 1942, or the first rent for such accommodation after March 1, 1942, and it will be noted from the registration statement [R. 19] that the maximum rent date for the dwelling in question was March 1, 1942, the effective date of the registration being November 1, 1942.

The Administrator issued his Rent Regulation for Housing under date of October 15, 1946, effective October 16, 1946, and this was the regulation which was in effect on March 4, 1947, when the lease in question was made. Section 2 of this regulation contains a prohibition against higher than maximum rents "regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into."

Section 4 of this regulation reads as follows:

> "Maximum rents. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be: * * * (i) Rent established under former sections 5(e). For housing accommodations with a maximum rent established, prior to March 1, 1943, under the first paragraph of section 5(e) as that paragraph appeared in Maximum Rent Regulations issued prior to such date, the rent on March 1, 1943, or if the accommodations were not rented on that date, the last rent prior thereto, but in no event more than the maximum rent established under such first paragraph of section 5(e). The Administrator may order a decrease in the maximum rent as provided in section 5(c)(8)."

This regulation has always been held to mean that maximum rents, once fixed, can be increased only by an order of the Administrator and the language of the regulation is so plain and unambiguous that there can be no doubt of the construction to be placed upon it. The situation is one frequently encountered where the principle involved is so elementary that decisions of the courts are difficult to find. Our search for citations and inquiry of the Rent Control authorities discloses but one applicable decision, that of the Appellate Deparment of the Superior Court of Los Angeles County in *Baur Properties Inc. v. Aaron Schwartz,* Superior Court No. Civ. A 6623, Trial Court No. 820772. In a Memorandum Opinion Judge Shaw, held this language to mean that "maximum rents once fixed can be increased only by an order of the Administrator (or Rent Director) made on petition of the landlord." In view of the fact that this decision does not appear in the published reports, we have added a copy of it to this brief as Appendix B. This, we take it, is in compliance with Rule 20(f).

Subsection (a) of Section 5 of this regulation provides that any landlord may file a petition for adjustment to increase the maximum rent only on the principal ground that "(1) There has been on and after the effective date of registration a substantial change in the housing accommodations by a major capital improvement, as distinguished from ordinary repair, replacement and maintenance." It is admitted that the appellees filed no such petition and it would seem from the language of the regulation to have been incumbent upon them to have proved their authority to increase the rent from the maximum of $75.00 per month, fixed under the regulation, to the amount of $350.00 per month, as specified in the lease. It was ad-

mitted that $350 per month had been demanded and accepted. (Request for admissions (17) [R. 26] and admission (17) [R. 31].)

That the appellees can take no benefit from the "Chandler Defense" is at once apparent from the record, where we find that after April 15, 1948, when Mrs. West "desisted from paying $350.00 per month" the defendant asked of her "$350.00 a month" [Stipulation of Counsel R. 55] and that Mr. Conrad refused to accept Mrs. West's tenders of the legal rent of $75.00 per month. [Stipulation of Counsel R. 69.] These tenders were returned without comment. [Testimony of Mrs. West R. 70.]

As to Alleged Error III.

The appellees also laid great emphasis upon the proposition that Mrs. West "was going to take the house for ambulatory patients" [testimony of Mr. Conrad R. 87] and to "bring in her clientele of ambulatory patients" [*Idem* R. 89]; "She was going to run it as a very high class rest home, a very fine home, all ambulatory patients, and that she would not take in any border line patients." [*Idem* R. 95.] These were all self serving declarations. Note the attempt to apply some sinister meaning to the adjective "ambulatory," which in its common acceptance and according to Webster means simply "Of or pert. to walking; having the faculty of walking; formed or fitted for walking, as an ambulatory animal." Mrs. West's roomers consisted, from time to time, of a few elderly ladies, a lady and her daughter, and two young men, all of whom could take care of themselves and were naturally "ambulatory."

But whether Mrs. West expressed herself as appellees would have us believe, is of little, if any importance in discussing the legal situation. The evidence was entirely to the effect that the house was to be used for dwelling and housing purposes, and even the testimony of Mr. Conrad and the other witnesses of the appellees was to the same effect, viz., that the dwelling was to be and actually was used for living and dwelling purposes, or, in other words, as housing accommodations within the purview of the Acts of Congress and the regulations. The Trial Court in this situation could not properly find and conclude that the premises were to be used for purposes of conducting a business therein and not for housing or dwelling purposes.

Under the regulation, Section 1, which exempted certain other housing, paragraph (4) provided "that this regulation *does* apply to entire structures or premises wherein 25 or less rooms are rented or offered for rent by any lessee, sub-lessee, or other tenant of such entire structure or premises, whether or not used by the lessee, sub-lessee or other tenant as a hotel or rooming house." How then, in the face of this regulation, can it be contended that the operation of a rooming house of less than 25 rooms could be treated as a commercial business, exempting the dwelling from rent control? The Administrator was given very broad powers under the Price Control Acts to make regulations, and, as the courts have repeatedly held, to make interpretations of such regulations. It is interesting to note, therefore, that the Administrator, as far back as August 15, 1942, interpreted the exemption of hospitals as not to include sanatariums.

Section 1(b) of Standard Rent Regulations for Hotels, Rooming Houses and Motor Courts provided:

> "This regulation does not apply to the following:
> * * *
>
> "(3) *Charitable or educational institutions.* Rooms in hospitals, or rooms of charitable or educational institutions used in carrying out their charitable or educational purposes."

The following is the Administrator's interpretation as to exemption of hospitals. Section 13(a)(6)—Interpretation 1(b)(3) August 15, 1942:

> "HOSPITALS; EXEMPTION.—T operates a large building, containing 130 rooms which are rented on a daily and weekly basis. The establishment is described and generally known as a sanatorium and is used by persons seeking rest and general care, rather than medical care. Two resident physicians are in attendance, but there are no operating rooms. Nursing services are supplied to clients of the establishment on request, but in most instances the clients either require no nursing services or supply their own personal attendants.
>
> "The establishment is not a 'hospital' within the provision of Section 1(b)(3) of the Hotel and Rooming House Regulation exempting 'rooms in hospitals' from the regulation. The term 'hospital' is to be understood in accordance with the meaning employed in common usage. Generally speaking, for an establishment to constitute a 'hospital' it should appear that (1) the establishment provides beds for persons who are ill or otherwise in need of medical care; (2) that it is so equipped and operated that medical care is available to the patients, either from

physicians on its staff or from private physicians who are authorized to give such services within the establishment; and (3) nursing services are provided. The primary function of the establishment should be to furnish facilities for those in need of medical care."

The foregoing is from Rent Regulations as appearing in the Commerce Clearing House Service and is a copy of the O. P. A. Interpretations 1 (b) 3 of Hotel Regulations, O. P. A. Service page 200:2541.

This interpretation has never been modified or rescinded.

This Court in *Bowles v. Wheeler,* 152 F. 2d 34, has said that such an interpretation of the regulations is entitled to great weight and serious consideration. This Court said (pp. 37, 38):

"(2) With respect to the regulations issued pursuant to the broad powers granted the Price Administrator to issue 'such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of the Act' (section 201 (d)) we find conclusive evidence of the clear intent of Congress to make anti-inflation controls as effective as legislative ingenuity could devise. We are specifically forbidden by the Act to 'consider' the validity and legality of the regulations (section 204(d)). Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834; Bowles v. Willingham, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892; Rosensweig v. United States, 9 Cir., 144 F. 2d 30; Bowles v. Nu Way Laundry, 10 Cir., 144 F. 2d 741, 746, certiorari denied 323 U. S. 791, 65 S. Ct. 431. It is, of course, the province and the duty of the court to determine for itself whether a defendant is within the coverage of the Act or regulation, but in the determination of that ques-

> tion it is not competent for the court to consider the fairness or equity of any regulation or price schedule established thereby. Such consideration is reserved for the Emergency Court. Bowles v. Nu Way Laundry, *supra.*' * * * His interpretation of the Act and the applicability of the regulations issued under authority of the Act are entitled to great weight and serious consideration. Also where the regulations purport to apply, the issue of applicability of the Act is a question for the Emergency Court only. See United States v. Pepper Bros., 3 Cir., 142 F. 2d 340, 343; Bowles v. Cullen, 2 Cir., 148 F. 2d 621; Bowles v. American Brewery, *supra;* Bowles v. Texas Liquor Board, 5 Cir., 148 F. 2d 265."

In the footnote to this Court's opinion appear several other citations showing a complete unanimity of opinion of the Federal Courts. To these citations we make brief reference.

In *Consolidated Water Power & Paper Co. v. Bowles,* 146 F. 2d 492, the Emergency Court of Appeals said (p. 494):

> "In any case of ambiguity in a regulation established by an administrative officer, his interpretation is entitled to great weight. Where reasonable, it well may be controlling."

In *Bowles v. Nu-Way Laundry Co.,* 144 F. 2d 741, 746, the Tenth Circuit announced the rule as follows:

> "Since the Administrator is empowered to fix and establish prices by promulgation and adoption of appropriate regulations he is also authorized to interpret such regulations for the guidance of those amenable to the Act and regulations, and such interpreta-

tions, if not controlling, are entitled to great weight so long as they do not distort or pervert the plain intendment of the Act. Cf. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 325, 53 S. Ct. 350, 77 L. Ed. 796."

In *Goodman v. Bowles,* 138 F. 2d 917, 919, the Emergency Court of Appeals has said:

> "This interpretation by the Administrator of his own regulation, which interpretation was made before any action was taken on the present complainants' petition for adjustment, is entitled to persuasive weight."

In *American Telephone & Telegraph Co. v. United States,* 299 U. S. 232, in affirming an order of the Federal Communications Commission, prescribing a uniform system of accounts for telephone companies, Mr. Justice Cardozo, speaking for a unanimous court, went so far as to say (p. 236):

> *"This court is not at liberty to substitute its own discretion for that of administrative officers* who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct Accounting'." (Emphasis supplied.)

In *Walling v. Cohen,* 140 F. 2d 453, the Third Circuit, in passing upon an interpretative ruling of the Administrator of the Wage and Hour Division of the Department of Labor, said (pp. 455, 456):

> "In passing upon the intent and scope of the orders, it is to be borne in mind that the interpretive rulings of the Administrator are entitled to great weight." * * * "And, as the competently promulgated orders of the Administrator have the force and effect of legislative enactments, by the same token, such orders are also to be liberally construed. Ralph Knight, Inc. v. Mantel, 8 Cir., 135 F. 2d 514, 517." * * * "When, therefore, the Administrator has placed an interpretation upon his order as being intended to include the manufacture of certain articles, it could be only where his interpretation is capricious and arbitrary that a court would be warranted in interfering with the order by placing a different construction upon it. The instant case affords no basis for such action. There is no evidence that the classification did not bear a reasonable relation to the objectives to be attained. See Columbus & G. Ry. Co. v. Administrator, 5 Cir., 126 F. 2d 136, 139."

A case of considerably more than passing interest in construing the rent regulation is *Lovett v. Bell,* Supreme Court of California, 30 Cal. 2d 8, 180 P. 2d 335. In that case, an unlawful detainer action, brought after the expiration of a lease, the defendants had gone into possession of a motor hotel, an entire structure containing 12

units and owned by plaintiffs, under a written lease covering a five year period ending September 30, 1945. Defendants occupied two units as living accommodations. On May 3, 1944, a written modification of the lease was executed, by the terms of which plaintiffs relinquished "their right to sell said premises free and clear of said lease prior to the expiration" thereof and defendants relinquished an option they had to renew the lease and "any interest in said leased premises above described after the 30th day of September, 1945." On September 25, 1945, the defendants tendered the monthly rent "for the calendar month October 1945." Plaintiffs promptly returned the check and on October 11, 1945, without complying with the provisions of the rent regulation, filed their complaint for unlawful detainer. From a judgment for plaintiffs defendants appealed. The Court said:

> "Among other purposes, the act as a war measure was designed to 'eliminate and prevent . . . disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; . . .' (50 U. S. C. A., App., §901.) Section 2(g) of the act provides that 'regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.' (50 U. S. C. A., App. §902(g).) In line with this expression of policy, section 1(d) of the Rent Regulation declares that 'an agreement by the tenant to waive the benefit of any provision of this regulation is void.' Such prohibition recognizes the

restricted supply of housing accommodations available during the designated period of national emergency and protects the tenants from the enforcement of exactions obtain by the landlord at variance with the rent control program." * * *

"The Rent Regulation defines 'housing accommodations' to mean 'any building, structure, or part thereof . . . rented or offered for rent for living or dwelling purposes.' (§13(a)(6).) It also defines 'landlord' to include 'an owner . . . or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations'; and it defines 'tenant' to include any person 'entitled to the possession or to the use or occupancy of any housing accommodations.' (§13(a)(8) and (9).) The chief consideration under these definitions seems to be the character of the initial occupancy of the property as housing accommodation." * * *

"Nor is it of any significance in the cited cases that the dispossession attempt was made with respect to a single family dwelling while here defendants use but two of the twelve units for their own housing accommodations and the balance of the motel is rented for business purposes. The Rent Regulation for Housing applies to 'entire structures or premises wherein 25 or less rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises, whether or not used by the lessee, sublessee or other tenant as a hotel or rooming house."

As to Alleged Error IV.

Mr. Conrad testified that he gave a previous tenant notice in January, 1946 that "I was going to change the classification and lease the property as business property" [R. 92] and that he made some unimportant repairs to the house [R. 92, 93], (not to be distinguished from ordinary repair, replacement and maintenance within the purview of the applicable regulation).

Subsection (a) of Section 5 of the Rent Regulation for Housing effective October 16, 1946, provided that

> "(a) *Grounds for increase of maximum rent.* Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that:
>
> (1) *Major capital improvement after effective date.* There has been on or after the effective date of regulation a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance. * * *"

Within a month after the old tenant moved out, he rented the dwelling house to Mrs. West at $275.00 a month in excess of the maximum lawful rent established by the Rent Control authorities, for, under Section 4 of the regulation, maximum rents could not be increased unless and until changed by the administrator as therein pro-

vided. The applicable section (repeated here for convenience) reads as follows:

> "Sec. 4. MAXIMUM RENTS. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be: * * *
>
> "(i) *Rent established under former section 5(e).* For housing accommodations with a maximum rent established, prior to March 1, 1943, under the first paragraph of section 5(e) as that paragraph appeared in Maximum Rent Regulations issued prior to such date, the rent on March 1, 1943, or, if the accommodations were not rented on that date, the last rent prior thereto, but in no event more than the maximum rent established under such first paragraph of section 5(e). The Administrator may order a decrease in the maximum rent as provided in section 5(c)(8)."

In the face of the admitted facts and of the applicable rent regulation, the Court concluded:

> "III.
>
> That the defendants have not violated the provisions of the Emergency Price Control Act of 1942, and of said Act as amended, nor the provisions of the Housing and Rent Act of 1947, or of said Act as amended, and particularly that the defendants have not violated the provisions of Section 205 of the Housing and Rent Act of 1947, or of said Act as amended." [R. 44.]

As to Alleged Error V.

At the time Mrs. West approached Mr. Conrad to lease the dwelling house, she was in very poor health and had had a breakdown; she was looking for a place to live; "The only thing was if we could rent out other rooms, other bedrooms." [R. 67.] Otherwise she could not afford it. [R. 58-68.]

As to the use to which the house was to be put Mrs. West testified "Mrs. Drake moved in with me," and "she took care of her own room" [R. 54]; "The old lady, Mrs. Drake, was to live with me in the house. She was to share it." [R. 60.] "She was an old lady and had her own property." [R. 61.] There wasn't anything physically wrong with Mrs. Drake at the time. "She was just like any elderly person. She at one time had a stroke, and was in the sanitarium, or hospital, a couple of weeks; then she was with me at the Sanitarium about a year and a half. She was going back to live in a house, on account of the sanitarium where sick people were." [R. 106.]

Mrs. Drake (obviously a witness hostile to Mrs. West), testified, "Mrs. West was looking for another location and home and I was looking for a place where I could rest and be free from the cares of my household." [R. 79.] Mrs. Drake had some furniture. "I had used from five or six rooms; about six rooms, half oriental rugs * * * I took them over. The oriental rugs, in the rest home." [R. 83.] Her furniture was not just in the living room downstairs. "It was all around the house." Mrs. West bought other furniture on Main Street. [R. 85.]

Melvin Baiter testified that he "and another fellow" rented a room from Mrs. West from August, 1947 to April, 1948. [R. 100.] He saw no people get medical treatment. "From my observation there wasn't anything

wrong with anybody * * * There was a Mrs. Emery, who was partially blind, but she got around about the same as everybody else did." His room was furnished with "just ordinary bedroom furniture, like you would find in a bedroom," the kind you would have in your own home. He saw no medical or physio-therapy treatments or appliances at any time and no hospital beds or anything like that. He saw Mrs. Drake there, but did not see her get any medical attention or any care of any kind. [R. 101.]

It was stipulated that Mr. Baiter's roommate, Mr. Wuertz, would testify to the same effect.

Mrs. Edna Baker roomed with Mrs. West at the time of the trial. She did not see any person get any medical treatment. [R. 103.]

It was stipulated that Mrs. West's daughter, Mrs. Della Rush "would testify that she visited the place on weekends; that it was not run as a sanitarium, in that it did not have equipment of the type concerning which "other witnesses have been asked, therapy and things like that." "She came there and saw people but she did not see any people being treated on the premises." "These roomers came and went * * * but the daughter knows all about that from the inception * * * from March, 1947 up to the date of the commencement of this action" and "that these conditions which she observed existed from the time Mrs. West moved in." [R. 110, 111.]

The foregoing is a statement of the undisputed facts in evidence, and the preponderance of the evidence proves the dwelling house was never operated as a sanitarium.

The fact remains undisputed that Mrs. West set out to take roomers (albeit some of them elderly) so that she might afford a home for herself and the record discloses that that is exactly what she did.

VI.

This Court Is Not Required to Accept Findings Unsupported by the Evidence and May Go Behind Discretion to Apply the Correct Rule of Law.

It is our contention that there is no conflict in the relevant and material evidence and that the trial court was led astray upon matters purely immaterial to a decision upon the main issue, viz., whether the dwelling house was to be and was used by appellant as "housing accommodations." In this situation it would seem that the burden is upon this Court to scrutinize the record and determine whether the trial court has applied the correct rule of law to the admitted facts. This requires looking beyond the findings of fact to the matters admitted, by which the trial court was bound.

Federal Rule 52 does not require this Court to accept fact findings unsupported by the evidence or conclusions of law which do not rest properly on the facts found. It was said in *Campana Corporation v. Harrison* (7th Circuit), 114 F. 2d 400 at 405:

> "In the application of Federal Rule 52 it is the following principle that guides this Court: the reviewing court does not review the evidence as an original fact finding tribunal: it does not attempt to settle conflicts in evidence or to determine questions of credibility. In re Duvall, 7 Cir., 103 F. 2d 653, 655; Guilford Const. Co. v. Biggs, 4 Cir., 102 F. 2d 46, 47. Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. It is certain that the principle giving the above described weight to the trial court's findings of fact, does not compel the reviewing court to give any

specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found."

"An appellate court may go behind discretion to ascertain correct legal standards."

In re Central R. of New Jersey, 163 F. 2d 44 at 49.

In construing a contract the Sixth Circuit said:

"Much reliance is placed by the appellee upon so-called findings of fact by the district judge. But the problem here presented involves the interpretation of a written contract. * * * In construing the contract we are confronted with a legal question within the competence of this court to decide."

Crosley Radio Corporation v. Dart, 160 F. 2d 426 at 431.

While it is not the province of this Court to review the discretion of the trial court, if exercised within legal bounds, it is the right and duty of this court "to determine whether in the exercise of the discretion committed to it, the trial court applied the correct legal standards."

Bratt v. Western Air Lines, 155 F. 2d 850 at 853.

If the ultimate finding is contrary to the evidentiary findings or is based upon a misapplication of the law to the evidentiary findings it is not binding on this Court.

United States v. Armature Rewinding Co., 124 F. 2d 589 and 591.

Where a judgment is against the undisputed evidence of the case, it cannot be upheld on appeal.

Grigsby v. Davey, 207 Cal. 181, 277 Pac. 330 at 331.

As to Alleged Errors VII, VIII, IX, X and XI.

The finding VII "That the defendant W. E. Conrad has not demanded or accepted nor received payment in excess of the maximum rent prescribed under the authority of the Emergency Price Control Act of 1942 and of said Act as amended and as prescribed by the authority of the Housing and Rent Act of 1947" is not only not supported by, but is against the evidence.

This finding was predicated upon the Court's previous findings and the proposition is elementary that an alleged finding of fact cannot be regarded as such where it appears that it is a conclusion drawn from the facts previously found.

It will be remembered that the dwelling house had been registered with a maximum rent or ceiling of $75.00 per month. [Pltf. Ex. No. 2.] Mr. Conrad testified that he had made no re-registration of the property, which fact was also stipulated by his counsel. [R. 94.] The defendants admitted that the property had been so registered as a rental dwelling [Admission (1), R. 23-29] and admitted that they had collected from Mrs. West the sum of $700.00 for the first and last months of the term of the lease, and "the sum of $350.00 on or about the 15th day of each and every month following the 15th day of March, 1947 to and including the 15th day of April, 1948." [Admissions (17), R. 26, 31.]

Further comment upon this erroneous finding of the Court seems to be unnecessary.

We have said in our specification of errors that the conclusion of law II [R. 44] "is against the law, immaterial, ambiguous and insufficient to support the judgment herein," and have argued above that, the dwelling house having been leased "as a guest house or any other lawful

purpose," it is quite immaterial as to the use to which the house was put so long as that use was legitimate. In spite of the facts as admitted, the Rent Control Acts and the regulations issued thereunder, the lower court has assumed to conclude that "it was the contemplation of the parties that the subject premises be used for purposes of conducting a business therein."

Now, for what business purpose, if you please, was the house to be used? The Housing Regulation exempts "farm tenants," service employees, "rooms or other housing accommodations within hotels or rooming houses or housing accommodations which have been, with the consent of the Administrator, brought under the control of the Rent Regulation for hotels and rooming houses pursuant to the provisions of that regulation"; "structures in which more than 25 rooms are rented or offered for rent"; "housing accommodations rented to the United States acting by the National Housing Agency"; "Summer Resort housing"; "Winter Resort housing."

> Rent Regulation for housing effective October 16, 1946, Section 1, Subsections (1), (2), (3), (4), (5) and (6).

Certainly the dwelling house in question did not fall under any of these classifications, and we do not believe that it can seriously be contended that it was, or was intended to be, used except as housing accommodations. Even if it be contended that renting a few rooms in a small dwelling house is "conducting a business therein," the fact remains that such an activity would not remove the dwelling house from the restriction of the regulation, nor change its character as a housing accommodation. For our part, we are constrained to believe that the highest use to which the dwelling could be put as a housing ac-

commodation would be to provide living quarters for as many roomers as the capacity of the little house would permit.

And it will be noted that the regulation just cited (Subsection (4)) specifically provided "This regulation *does* apply to entire structures or premises wherein 25 or less rooms are rented or offered for rent," etc., and the dwelling house in question definitely falls within this category.

In the light of what we have said, the Court's Conclusion III [R. 44] is equally vulnerable, and it seems unnecessary to argue that Finding VII [R. 43] is peculiarly susceptible to successful attack.

If we are correct in our criticism of the Court's findings and of his other conclusions, it necessarily follows that, the Conclusion IV [R. 44] that "the plaintiff is entitled to no judgment" is contrary to the law and the evidence.

Conclusion.

In view of the undisputed facts of this case and of the authorities submitted, it is conclusive that a "ceiling" of $75.00 was fixed as the maximum rental of the dwelling house in question; that no action was ever taken by appellees, nor by the rent control authorities to modify said registration or "ceiling"; that under the authorities cited, particularly Section 4(a) and Section 5(a) of the regulations of October 15, 1946, it was incumbent upon appellees to prove their authority for making any change in such maximum rent. Appellant submits that the written lease, typed and prepared by the appellee, W. E. Conrad, particularly the clause providing for the purposes for which the dwelling house would or might be used, conclusively negated appellees claims as to a limited use of the dwelling

house and that under the authorities cited such written lease superseded all prior or current oral negotiations or stipulations and precluded evidence attempting to vary the unambiguous terms of the written agreement.

Appellant submits that the evidence produced by her was entirely to the effect that the dwelling house was to be and was used for dwelling and housing purposes and that even the testimony of appellees' witnesses was to the same effect, viz.: that the premises were to be and actually were used for living and dwelling purposes. It is obvious that appellees were trying to evade the provisions of the Rent Control Acts. Mr. Conrad admitted that he gave the previous tenant notice to vacate on the ground that he was going to lease the property as business property. [R. 92.] He made some minor repairs [R. 92-93] but under the then existing law any such remodelling that would warrant eviction was required to be "a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance"; and even then only for the continued use of the premises as housing accommodations, and this could only be accomplished with the consent of the Administrator. Mr. Conrad made no substantial changes or alterations in the dwelling house, but rented it in its then present condition to Mrs. West for $350.00. This was all part of his attempt to escape or evade the maximum rent registration or "ceiling" on the dwelling house. Even if the dwelling house had been rented for the business purpose of conducting a rooming house, boarding house or hotel, it would still be subject to Rent Control Regulations, and even if by any stretch of the imagination it could be held that appellant was conducting or had agreed to conduct a sanatarium in a dwelling house of the size and nature of that involved herein for a few elderly persons, it is

submitted this did not exempt nor decontrol the property from the classification of "housing accommodations."

We are constrained to the opinion that the Judgment of the District Court must be reversed and the case remanded with instructions to the District Court to determine the reasonable fees of appellant's attorneys and thereupon to enter Judgment in favor of appellant and against appellees for the amount so determined, plus liquidated damages in the sum of nine thousand nine hundred dollars ($9,900.00), as prayed in the Complaint.

All of which is respectfully submitted,

GEORGE W. MANIERRE,
PAUL G. BRECKENRIDGE,
Attorneys for Appellant.

APPENDIX A.

Being a Resumé of Pertinent Acts of Congress and Rent Control Regulations.

Under the Emergency Price Control Act of 1942 (Jan. 30, 1942, c. 26, 56 Stat. 23) it was provided:

"Sec. 2(g) Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

"Sec. 201(a) There is hereby created an Office of Price Administration which shall be under the direction of a Price Administrator (referred to in this act as the 'Administrator'). * * * (d) The Administrator may from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Under Sec. 203, sub-paragraph (a) it was provided that any person subject to any provision of a regulation, order or price schedule made by the Administrator might file a protest; the merits of which protest should, under sub-paragraph (d) be passed on in the first instance by the Administrator. Section 204 provided for a review of the action of the Administrator by the Emergency Court of Appeals upon complaint of any person aggrieved by the denial or partial denial of his protest and gave exclusive jurisdiction to the Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, to determine the validity of any regulation or order issued under Section 2. Sub-paragraph (d) of this Section 204 provided "Except as provided in this section no court, Federal, State or Territorial, shall have jurisdiction or power to consider the

validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule or any provision of any regulation, order or price schedule, or to restrain or enjoin the enforcement of any such provision."

The provisions above noted of the Emergency Price Control Act of 1942 were carried into the Amendment of 1944.

In pursuance of the authority vested in him the Administrator in the first instance issued his rent regulation for housing under which it was required that "within 45 days after the effective date of this maximum rent regulation, or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent, shall file in triplicate a written statement on the form provided therefor, to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit, and shall contain such other information as the Administrator shall require." (1388.987 of Rent Regulations.)

Section 1388.984 reads as follows:

"Maximum Rents. Maximum rents (unless and until changed by the Administrator, as provided in Sec. 1388.985) shall be

(a) for housing accommodations rented on March 1, 1942, the rent for such accommodations on that date * * *

(c) for housing accommodations not rented on March 1, 1942, nor during the two months ending on that date, but rented prior to the effective date of this maximum

rent regulation, the first rent for such accommodations after March 1, 1942."

This maximum rent regulation was subsequently amended so as to read "on or before the date specified in Schedule A of this regulation, or within 30 days after the property is first rented," etc., and there was appended to the amendment Schedule A of defense rental areas in which it appeared that Los Angeles County, except Catalina Township, was in the defense rental area under rent regulation for housing; that the maximum rent date was March 1, 1942; the effective date of the regulation was November 1, 1942, and that the date by which registration statement to be filed (inclusive) was December 16, 1942. (See Document No. 58272 Rent Regulation for Housing, Part 1388.1181 with Schedule "A" 10 FR 5089 and 10 FR 11666)

The Administrator later issued his Rent Regulation for Housing under date of October 15, 1946, which became effective October 16, 1946, and this was the regulation which was in effect on March 4, 1947, when the lease in question was made. The regulation applied "to all housing accommodations within each of the defense rental areas and each of the portions of a defense rental area as listed in the regulation";

Sub-paragraph (b) of Section 1 of this regulation reads as follows: "This regulation does not apply to the following: * * * (f) *Structures in which more than 25 rooms are rented or offered for rent.* Entire structures or premises wherein more than 25 rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises: *Provided.* That this regulation DOES apply to entire structures or premises wherein 25 or less rooms are rented or offered for rent

by any lessee, sublessee or other tenant of such entire structure or premises, whether or not used by the lessee, sublessee or other tenant as a hotel or rooming house; And provided further, That this regulation DOES apply to an underlying lease of any entire structure or premises which was entered into after the maximum rent date and prior to the effective date of regulation, while such lease remains in force with no power in the tenant to cancel or otherwise terminate the lease."

Section 2 of this regulation is as follows:

"*Prohibition against higher than maximum rents (a) General prohibition.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation: and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received."

Section 4 of this regulation reads:

"MAXIMUM RENTS. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be * * * (i) *Rent established under former sections 5(e).* For housing accommodations with a maximum rent established, prior to March 1, 1943, under the first paragraph of section 5(e) as that paragraph appeared in Maximum Rent Regulations issued prior to such date, the rent on March 1, 1943, or, if the accommodations were not rented on that date, the last rent prior thereto,

but in no event more than the maximum rent established under such first paragraph of section 5(e). The Administrator may order a decrease in the maximum rent as provided in section 5(c)(8)."

Sub-section (a) of Section 5 of the regulation provides that: "Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that: (1) There has been on or after the effective date of regulation a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance. * * *"

Paragraph (6) of Section 13 of this regulation defines 'housing accommodations' as follows: " 'Housing accommodations' means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property."

The Congress subsequently defined "housing accommodations," in harmony with the regulations previously issued by the Administrator, in Section 202 of the Housing and Rent Act of 1947, as Amended, reading as follows: "(b) The term 'housing accommodations' means any building, structure or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, rooming or boarding-house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property."

It is significant that none of the provisions of the regulations above noted has ever been invalidated, modified, or set aside by either the Administrator, the Emergency Court of Appeals or the Supreme Court and that as and when promulgated, in accordance with the statute, no successful protest against them having ever been made, such regulations became, and since such promulgation have been, the law of the land.

Section 205(e) of the Emergency Price Control Act of 1942 (Public Law 421 of the 77th Congress, U. S. Code Congressional Service 1942 Page 23) in effect Jan. 30, 1942, provided that:

"If any person selling a commodity violates a regulation order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the Court. For the purposes of this section the payment or receipt of rent for defense area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be * * * Any suit under this sub-section may be brought in any court of competent jurisdiction and shall be instituted within one year after delivery is completed or rent is paid."

The Emergency Price Control Act of 1942 provided for the recovery of treble damages by a tenant, but in the Amendment of 1944 (the Stabilization Extension Act of 1944, Public Law 383, 78th Congress, 1944 U. S. Code Congressional Service, p. 616) there was inserted the so-

called "Chandler Defense" so that Sec. 205(e) of the Act was made to read as follows:

"If any person selling a commodity violates a regulation order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater; (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.* For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price." (The so-called "Chandler Defense" is italicized.)

The Price Control Extension Act of 1946 (Public Law 548, 79th Congress, 2nd Session, 1946 U. S. Code Congressional Service 632 at 644) amended the second sentence of Section 205(e) of the Emergency Price Control Act of 1942, as amended, to read:

"In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.* (The so-called "Chandler Defense" as modified is italicized.)

The original Act as well as the Amendment of 1944 provided under Section 205(c) that the District Courts shall have jurisdiction of criminal proceedings for violations of Section 4 of this act and concurrently with State and territorial courts of all other proceedings under Section 205 of this Act. Section 205(e) of the Housing and Rent Act of 1947 materially modified the provisions of the preceding Sections 205 so as to read as follows: "Any person who demands, accepts, or receives any payment of

rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.* Suit to recover such amount may be brought in any Federal, State or Territorial court of competent jurisdiction within one year after the date of such violation." (The modified "Chandler Defense" is italicized.)

It will thus be seen that while the language conferring jurisdiction was substantially equivalent to that in the preceding Acts and the modified "Chandler Defense" was retained, the court was divested of jurisdiction to exercise its discretion to award less than treble damages unless the "Chandler Defense" was proven.

APPENDIX "B."

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

Baur Properties, Inc., etc., Plaintiff and Respondent, vs. Aaron Schwartz, et ux., Defendants and Appellants. Superior Court No. Civ. A 6623. Trial Court No. 820,772.

Memorandum Opinion.

Appeal by defendants from a judgment and an order made by the Municipal Court of the City of Los Angeles, Joseph Marchetti, Judge. Reversed. Appeal from order dismissed.

Plaintiff brought this proceeding in unlawful detainer for non-payment of rent. Plaintiff founds its case on a notice demanding rent at the rate of $75.00 per month. Defendants, not denying that the rent when they first went into possession was at that rate, set up in their answer two orders of the O.P.A. Rent Director, made March 17, 1947, which had the effect, they contend, of reducing the lawful rent to $42.50 per month. If this is so, then plaintiff's notice demanded more rent than was due and is for that reason insufficient to support its judgment. (Johnson v. Sanchez, 1942), 56 Cal. App. 2d 115, 117.)

Copies of the orders pleaded were annexed to the answer and no affidavit denying their genuineness or due execution appears in the record. The record is duly certified by the clerk, it contains no notice from the respondent designating such an affidavit to be included in the record, and under Rule 21 of Rules on Appeal from Municipal Courts in Civil Cases we must presume that the

record is complete and sufficient for the determination of the appeal, and hence that there is no such affidavit. The genuineness and due execution of the orders annexed to the answers are therefore deemed admitted. (C. C. P., sec. 448; Stoneman v. Fritz (1939), 34 Cal. App. 2d 26, 30-1.) Copies of them were also introduced in evidence.

One of these orders declares that the Rent Director has determined that the maximum rent for the apartment occupied by defendant should be decreased, under certain specified provisions of the Rent Regulation, "effective from 1st rent date after December 1, 1942, . . . To decrease rates representing furnished condition to unfurnished condition," and then orders that the maximum rent "is decreased from as per Schedule attached" effective on the date above stated, that no rent in excess of that thus fixed may be received or demanded, and that any rent in excess of that so fixed collected since the effective date of the order except for one month in 1946, shall be refunded to the tenant. The attached schedule shows "Max. Rent" of $75.00 per month, "Decrease" $25.00 per month, and "New Max. Rent" $50.00 per month, and is endorsed "To decrease rates representing furnished condition to unfurnished condition" and "The above rates include maid services, linens and utilities."

The other order of March 17, 1947, is in the same form, except that it declares it "shall be effective from 1st rent date after September 1, 1946, by reason of withdrawal of maid service and linens" and that there is no exception to the order for refund of excess rent collected. The attached schedule shows "Max. Rent" $50.00 per month "Decrease" $7.50 per month, and "New Max. Rent" $42.50 per month, and is endorsed "Withdrawal of Maid Service and Linens."

Construing these orders, it is plain to us that each of them is an order directly and positively reducing the rent as stated in it, and forbidding the landlord to collect more than the amount of the reduced rent so fixed. Reasons for making the orders are stated, but they cannot reasonably be given the effect of establishing an optional schedule of several rents, either of which may be charged by the landlord according to the services, etc., furnished from time to time with the apartment. The provisions of the Rent Regulation for Housing referred to in the orders as their basis are section 5(c)(3) and section 5(b). The former authorizes an order decreasing the maximum rent when there has been a decrease in the minimum services, furniture, furnishings or equipment furnished on the maximum rent date and the latter authorizes a landlord to decrease services, etc., in certain cases, on condition that he notify the rent office, but also authorizes an order decreasing rent in such a case. Maximum rents once fixed can be increased only by an order of the Administrator (or Rent Director) made on petition of the landlord. (See sec. 4 and sec. 5(a) of the Regulation.) The Regulation does not contemplate the fixing of a sliding scale of maximum rents, depending on the services, etc., but a single maximum rent for the services, etc., furnished at the time it is fixed, and requires any change due to changing services, etc., to be made by the Administrator (or Rent Director).

In addition to stipulating that copies of the two orders above discussed might be put in evidence in place of the originals, the parties stipulated also "that the said Rent Director made three orders on Mar. 17, 1947, as follows: (a) That if said apartment 601 is furnished and is provided with maid service and linens, then the rent for said

apartment is $75.00 per month. (b) That if said apartment is unfurnished and is provided with maid and linen service, then the rent would be $50.00 per month, and (c) That if the said apartment is unfurnished and no maid service or linens provided, the rent would be $42.50 per month."

The plaintiff contends that we should accept this stipulation as determining what orders were made rather than look at the actual orders in evidence, and that, according to the stipulation, the orders do establish a variable schedule of rents, to be applied by the jury to such facts as they found true regarding the services, etc., furnished with the apartment. We need not decide whether these contentions can be supported. It is an admitted fact that the orders annexed to the answer were made, and for reasons already stated they must be given the effect of reducing the rent of defendant's apartment to $42.50 per month. If the orders set forth in the stipulation operated to increase that rent to the $75.00 per month demanded by plaintiff, they did so only if the apartment was furnished *and* provided with maid service and linens. It appears without conflict that long before the notice was given, plaintiff ceased to furnish linens to the defendants. Their excuse is that defendants had misused the linens formerly furnished them. This does not alter the fact that linens were no longer furnished. The order fixing the rent at $75.00 per month, if made as plaintiff contends, is conditioned on the furnishing of linens, not on the existence of a good reason for not doing so.

The judgment is reversed and the cause is remanded for a new trial, appellants to recover their costs of appeal. The appeal from the order denying motion for a new trial is dismissed.

Dated April 13, 1948.

SHAW, Presiding Judge.

We concur.

BISHOP, Judge.

STEPHENS, Judge.

Filed Apr. 13, 1948. Earl Lippold, County Clerk; by E. B. Morcom, Deputy.